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DECISION

THE COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

[Protest of GSA Procurement Policy]

FILE: B-200019 DATE: May 4, 1981

MATTER OF: Swingline, Inc.

DIGEST:

1. Protest that General Services Administration (GSA) should reinstate policy requiring dealers to obtain written manufacturer's authorization, is denied where protester failed to establish that GSA's abandonment of requirement lacked rational basis.

2. Where protester raises issues unrelated to protest at hand, they will not be considered in decision; to extent these issues involve prior procurements, they are untimely raised under GAO Bid Protest Procedures.

Swingline, Inc. (Swingline) protests the award of contracts to any other firm under two solicitations, FCGE-R-75142-N and FCGE-D-75140-N, issued by the General Services Administration, Federal Supply Service (GSA), for the Swingline Model 6120 Electrical Collator and Model 6200 High Speed Letter Opener, respectively. While J. Snell and Company (Snell), a regular dealer, is the low offeror and likely awardee for Model 6120, GSA reports that Swingline is in line for award (pending responsibility and price reasonableness determinations) as the low offeror on Model 6200. Accordingly, our review here pertains only to the solicitation for Model 6120.

Swingline's principal objection to these procurements is that GSA contemplates making awards of multiple award Federal Supply Schedule contracts to third parties (including dealers such as Snell), without requiring those dealers to furnish a written authorization from the manufacturer of the item being procured. Swingline argues that the failure to require a dealer to obtain a written authorization "is improper and creates unhealthy, uncompetitive conditions which are not in the best interest of the Government, business community, or using Agencies."

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Among the potential uncompetitive conditions cited are the following: monopolization of sales in one area by a "greedy" dealer willing to sell at a reduced profit; inability of Swingline to compete with manufacturers which don't sell to dealers but hold their own GSA contracts and provide local service; the "freezing out" of the other dealers in a manufacturer's dealer network; and the danger that procuring agencies in need of local sales and service will purchase more expensive competitive products in lieu of Swingline items supplied by a remote dealer unequipped to provide national sales and service assistance. In this regard, Swingline claims that the Model 6120 Electrical Collator requires setup, possible adjustment, operator training, and local service during the warranty period: assistance that a regional dealer such as Snell may not be capable of providing. The protester concludes that, where a procured item will need local sales and service, GSA should require that third parties obtain written authorization from the manufacturer of the item in order to qualify for the award. It asks that GSA be directed to award Swingline the contract for the Model 6120.

In its response, GSA explains that its practice of requiring letters of authorization was discontinued in 1978 based on findings that it tended to discourage some dealers from competing. The requirement apparently had been instituted by GSA to ensure that dealers bidding on these multiple-award contracts would be able to obtain sufficient quantities of a manufacturer's product to satisfactorily perform the contract. In operation, however, it was also found to enable manufacturers to veto participation by any given dealer, and thus to determine which among competing dealers would receive an award. GSA viewed this situation as being at least potentially anticompetitive and, reasoning that other adequate safeguards were available to ensure proper performance by dealers (i.e., the responsibility determination and the option to cancel a contract with 30 days' notice), decided to omit the authorization requirement from these solicitations. GSA maintains that

this decision represented a reasonable exercise of its administrative discretion and thus should be left undisturbed. We agree.

It has long been the position of our Office that the determination of how best to satisfy the Government's requirements is within the ambit of sound administrative discretion, and we will not substitute our judgment for that of the agency in the absence of a clear showing of an abuse of this discretion. Penco Products, Inc., 43 Comp. Gen. 62 (1968); Baker Manufacturing Company, Inc., B-193963, August 6, 1979, 79-2 CPD 82; see also, 40 U.S.C. § 481 (a)(1) (1976). The burden of proof for such a showing rests upon the protester. Baker Manufacturing Company, Inc., supra.

Here, based on its experience with contracts imposing the authorization requirement, GSA has determined that abolition of the requirement will benefit the Government by opening competition to certain dealers previously dissuaded from competing, and by removing a manufacturer's potential veto over awards to dealers in its products. While Swingline has posed several countervailing uncompetitive conditions which could result from the continued omission of the requirement, it nowhere addresses the merits of the above considerations which persuaded GSA to abandon the requirement. Keeping in mind that the determinative factor here is whether GSA has a rational basis for its current policy and not whether other evidence would also justify following the opposite course, we do not believe that Swingline has carried its burden of proof. Even assuming, arguendo, that the considerations urged by the protester would weigh in favor of reinstating the authorization requirement, GSA's concerns militating against the requirement appear equally reasonable. Indeed, we find that GSA's view more closely comports with the basic policy mandating that Government purchases "be made on a competitive basis to the maximum practicable extent." Federal Procurement Regulations § 1-1.301 (1964 ed. amend. 169); Kathryn A. Rogerson, B-202366, March 26, 1981, 81-1 CPD ___. Under these circumstances, we find

no basis for concluding that GSA's policy against requiring written authorizations is unreasonable, and the protest is therefore denied. See generally Quest Electronics, B-193541, March 27, 1979, 79-1 CPD 205; Office and Interior Furnishings, B-191655, September 5, 1978, 78-2 CPD 168.

The protester raises two additional contentions, the first regarding the propriety of awarding a single dealer multiple-award contracts for competing products, and the second questioning GSA's practice of requiring different discounts of manufacturers depending on whether or not they sell through dealers. We find no indication in the record, however, that either of these issues pertains to the procurement under review here and we accordingly decline to consider them at this time. See Jekyll Towing and Marine Services Corporation, B-199199, December 1, 1980, 80-2 CPD 413. Furthermore, to the extent that these issues involve prior procurements, they are untimely raised. 4 C.F.R § 20.2(b)(1) (1980).

The protest is denied in part and dismissed in part.

Milton J. Socolar

Acting Comptroller General
of the United States